

UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

JAY A. WIVELL,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 4:CV-07-1196
	:	
MICHELE WIVELL, ET AL.,	:	(Judge McClure)
	:	
Defendants	:	

**MEMORANDUM**

July 11, 2007

**Background**

Jay A. Wivell (“Plaintiff”), an inmate presently confined at the Adams County Correctional Facility, Gettysburg, Pennsylvania, filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. His complaint is accompanied by an *in forma pauperis* application. For the reasons set forth below, Wivell’s action will be dismissed, without prejudice, as legally frivolous under 28 U.S.C. § 1915.

Named as Defendants are the Plaintiff’s wife, Michele Wivell and Chief James Holler of the Liberty Township, Pennsylvania Police Department.<sup>1</sup> Wivell

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<sup>1</sup> It is unclear as to whether the Plaintiff is still married.

states that during September, 2004, his wife committed adultery and thereafter filed a falsified Protection From Abuse petition (“PFA”) against him. Plaintiff adds that his wife’s alleged actions ultimately led to numerous adverse circumstances including the initiation of criminal charges against him and his present incarceration.

The complaint also generally alleges that Plaintiff’s wife conspired with Defendant Holler, an Adams County Judge, and the District Attorney’s office to deprive him of his constitutional rights. See Record document no. 1, p. 4. As relief, Plaintiff seeks an award of monetary damages.

### **Discussion**

28 U.S.C. § 1915 imposes obligations on prisoners who file civil actions in federal court and wish to proceed *in forma pauperis*. § 1915(e)(2) provides:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (I) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

Consequently, federal courts reviewing civil rights complaints filed by persons wishing to proceed *in forma pauperis* may determine that process should not be issued if the complaint is malicious, presents an indisputably meritless legal

theory, or is predicated on clearly baseless factual contentions. Neitzke v. Williams, 490 U.S. 319, 327-28 (1989); Wilson v. Rackmill, 878 F.2d 772, 774 (3d Cir. 1989).<sup>2</sup> In Deutsch v. United States, 67 F.3d 1080, 1083 (3d Cir. 1995), the Third Circuit added that "the plain meaning of 'frivolous' authorizes the dismissal of *in forma pauperis* claims that . . . are of little or no weight, value, or importance, not worthy of serious consideration, or trivial." "The frivolousness determination is a discretionary one," and trial courts "are in the best position" to determine when an indigent litigant's complaint is appropriate for summary dismissal. Denton v. Hernandez, 504 U.S. 25, 33 (1992).

It is well settled that a plaintiff, in order to state an actionable civil rights claim, must plead two essential elements: (1) that the conduct complained of was committed by a person acting under color of law, and (2) that said conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. Groman v. Township of Manalapan, 47 F.3d 628, 638 (3d Cir. 1995); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1141-42 (3d

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<sup>2</sup> Indisputably meritless legal theories are those "in which it is either readily apparent that the plaintiff's complaint lacks an arguable basis in law or that the defendants are clearly entitled to immunity from suit." Roman v. Jeffes, 904 F.2d 192, 194 (3d Cir. 1990) (quoting Sultenfuss v. Snow, 894 F.2d 1277, 1278 (11th Cir. 1990)).

Cir. 1990). As previously noted, Plaintiff contends that his wife filed a falsified PFA petition and sworn statements against him. There is no indication in the present case that Defendant Wivell was acting under color of state law. Accordingly, with the exception of the vague assertion that Mrs. Wivell conspired with state officials, a viable § 1983 claim has not been stated against said Defendant. It is also noted that witnesses are generally entitled to absolute immunity from civil rights claims for damages based upon their testimony. See Clark v. Vernon, 2007 WL 1034802 \*2, n. 3 (3d Cir. April 5, 2007). Thus, Plaintiff's apparent claim that his wife gave false testimony against him is additionally insufficient for purposes of § 1983.

Second, in order to set forth a cognizable conspiracy claim, a plaintiff cannot rely on broad or conclusory allegations. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1377 (3d Cir. 1992), cert. denied, 506 U.S. 1079 (1993); Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989); Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989). The Court of Appeals for the Third Circuit has further noted that "[a] conspiracy claim must . . . contain supportive factual allegations." Rose, 871 F.2d at 366. Moreover, "[t]o plead conspiracy adequately, a plaintiff must set forth allegations that address the period of the

conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166 (3d Cir. 1989).

The essence of a conspiracy is an agreement or concerted action between individuals. See D.R. by L.R., 972 F.2d at 1377; Durre, 869 F.2d at 545. Consequently, a plaintiff must allege with particularity and present material facts which show that the purported conspirators reached some understanding or agreement or plotted, planned and conspired together to deprive plaintiff of a protected federal right. Id.; Rose, 871 F.2d at 366; Young v. Kann, 926 F.2d 1396 1405 n.16; Chicarelli v. Plymouth Garden Apartments, 551 F. Supp. 532, 539 (E.D. Pa. 1982). Where a civil rights conspiracy is alleged, there must be some specific facts in the complaint which tend to show a meeting of the minds and some type of concerted activity. Deck v. Leftridge, 771 F.2d 1168, 1170 (8th Cir. 1985). A plaintiff cannot rely on subjective suspicions and unsupported speculation. Young, 926 F.2d at 1405 n.16 (3d Cir. 1991).

Based upon an application of the above standards to Plaintiff's present conspiracy claim, his vague, wholly unsupported allegations do not satisfy the pleading requirements of Rose, Deck, and Young. Specifically, there are simply no averments of fact in the complaint that reasonably suggest the presence of an agreement or concerted activity between his wife and any state officials to violate

Plaintiff's civil rights. It is apparent that Plaintiff's assertion that his wife conspired with police (presumably Defendant Holler), the District Attorney's office, and an Adams County Judge to deprive him of his constitutional rights is nothing more than mere speculation.

Finally, in Heck v. Humphrey, 512 U.S. 477 (1994), the United States Supreme Court ruled that a constitutional cause of action for damages does not accrue "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," until the Plaintiff proves that the "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486-87. Based on the allegations raised by Wivell, a finding in his favor would imply the invalidity of his related Adams County criminal prosecution[s]. See Gibson v. Superintendent, 411 F.3d 427, 449 (3d Cir. 2005); Sanchez v. Gonzalez, No. 05-2552, 2005 WL 2007008 \*2 (D.N.J. Aug. 16, 2005).

Since Plaintiff's complaint is "based on an indisputably meritless legal theory" it will be dismissed, without prejudice, as legally frivolous. Wilson, 878 F.2d at 774. An appropriate Order will enter.

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s/ James F. McClure, Jr.  
JAMES F. McCLURE, JR.  
United States District Judge



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MICHELE WIVELL, ET AL., : (Judge McClure)  
: .  
Defendants : .

**ORDER**

July 11, 2007

In accordance with the accompanying Memorandum, **IT IS HEREBY  
ORDERED THAT:**

1. Plaintiff's complaint is dismissed without prejudice as frivolous pursuant to 28 U.S.C. § 1915 (e)(2)(B)(I).
2. The Clerk of Court is directed to close the case.
3. Any appeal from this Order will be deemed frivolous, without probable cause and not taken in good faith.

s/ James F. McClure, Jr.  
JAMES F. McCLURE, JR.  
United States District Judge